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**IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION**

**UNITED STATES OF AMERICA and
CRAIG HARBRIDGE, Revenue Officer,**

No. C-07-04234 JW

Petitioners,

**MOTION TO FIND RESPONDENT
IN CONTEMPT AND
MEMORANDUM IN SUPPORT OF
UNITED STATES OF AMERICA'S
REQUEST**

PAUL J. SHOLTZ,

DATE: March 31, 2008
TIME: 9:00 a.m.
PLACE: Courtroom 8, 4th Floor

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on March 31, 2008, at 9:00 a.m., before the Honorable James Ware, United States District Court Judge, United States District Court, 4th Floor, Courtroom No. 8, 280 South First Street, San Jose, California, the Petitioners, United States of America and Craig Harbridge, through its undersigned counsel, will move that Respondent, Paul J. Sholtz, be found in contempt of this Court. This motion is based on the Memorandum of Points and Authorities filed herewith, and all the pleadings on file in this matter.

MEMORANDUM OF POINTS AND AUTHORITIES

On December 20, 2007, the Court entered its Order Granting Petition To Enforce Internal Revenue Service Summons. The United States twice informed respondent that if he did not comply by

1 February 18, 2007, with the summons enforced by this Court, the United States would seek an Order
 2 from this Court finding respondent in contempt. See Declaration of Moore at ¶¶ 2-3. The respondent
 3 did not appear or produce the required documents or give testimony concerning the required documents
 4 by February 18, 2007. Instead respondent sent a letter to the U.S. Attorney's Office, refusing to answer
 5 questions or produce documents concerning his income, in violation of the Order of this Court. See
 6 Declaration of Moore at ¶4.

7 **I.**

8 **PRELIMINARY MATTERS**

9 **A. The Power of Contempt to Enforce Orders**

10 This Court, as do all courts of the United States, possesses the inherent power to enforce its
 11 Orders by contempt proceedings and to compel the performance of the actions commanded by those
 12 Orders. Cheff v. Schnackenberg, 384 U.S. 373 (1966). So great is this Court's civil contempt power
 13 that its sanctions extend to conditional imprisonment and fines to compel compliance with its Orders.
 14 United States v. Asay, 614 F. 2d 655, 659 (9th Cir. 1980); 28 U.S.C. Section 1651(A)^{1/}; Rule 70 of the
 15 Federal Rules of Civil Procedure^{2/}; 26 U.S.C. Section 7604(b).^{3/}

16
 17 ^{1/} Section 1651(a) of 28 U.S.C. provides:

18 (a) The Supreme Court and all courts established by Act of Congress may issue all
 19 writs necessary or appropriate in aid of their respective jurisdictions and agreeable to
 the usages and principles of law.

20 ^{2/} Rule 70 of the Federal Rules of Civil Procedure provides in pertinent part:

21 If a judgment directs a party to ... perform any other specific act and the party fails to
 22 comply within the time specified, the court may direct the act to be done at the cost
 23 of the disobedient party by some other person appointed by the court.... The court
 may also in proper cases adjudge the party in contempt.

24
 25 ^{3/} Section 7604(b) of 26 U.S.C. provides:

26 (b) -- Whenever any person summoned under section 6420(e)(2), 6421(g)(2),
 27 6427(j)(2), or 7602 neglects or refuses to obey such summons, or to produce books,

28 (Fn. Cont'd)

B. Distinction Between Criminal and Civil Contempt

While respondent Paul J. Sholtz faces civil contempt it is important to discuss the distinction between civil contempt and criminal contempt as the difference is not always clear. "The same conduct may result in citations for both civil and criminal contempt." **United States v. Rylander**, 714 F. 2d 996, 1001 (9th Cir. 1983), cert. denied, 467 U.S. 1209 (1984) (referred to as Rylander III); **United States v. United Mine Workers**, 330 U.S. 258 (1946). It is the type of punishment which accounts for the major difference between the two: "Punishment for civil contempt is intended to be either coercive or compensatory, whereas the purpose of criminal contempt punishment is punitive." **Rylander III**, 714 F. 2d at 1001; **United States v. Asay**, 614 F. 2d 655, 659 (9th cir. 1980).

In the present case, the United States asks for civil penalties. The civil contempt involves the respondent's continued refusal to testify and produce records to the United States. The testimony and production was ordered by the Court on December 20, 2007. The respondent knowingly and intentionally refused to obey the order on January 8, 2008, and his refusal continues today. Declaration of Moore, Ex. 2. Remedial punishment is appropriate in this instance, and the United States asks that Paul J. Sholtz be fined \$500 a day until he complies with the Order Enforcing Summons. The United States also asks that in the event the respondent cures the contempt by testifying and producing the required documents within ten days of the contempt order, that he be purged of his contempt. Finally,

3/ Cont'd)

papers, records, or other data, or to give testimony, as required, the Secretary may apply to the judge of the district court or to a United States commissioner for the district within which the person so summoned resides or is found for an attachment against him as for a contempt. It shall be the duty of the judge or commissioner to hear the application, and, if satisfactory proof is made, to issue an attachment, directed to some proper officer, for the arrest of such person, and upon his being brought before him to proceed to a hearing of the case; and upon such hearing the judge or the United States commissioner shall have power to make such order as he shall deem proper, not inconsistent with the law for the punishment of contempts, to enforce obedience to the requirements of the summons and to punish such person for his default or disobedience.

1 the United States asks that if respondent fails to comply with the Order Enforcing Summons within
 2 ten days of the contempt order, that he be jailed and that the fine continue to accrue until he complies
 3 with the Order Enforcing Summons.

4 C. Right to Counsel

5 The general rule is that a respondent has a right to counsel in a civil contempt hearing.

6 **Ridgway v. Baker**, 720 F.2d 1409, 1415 (5th Cir. 1983); **In re Di Bella**, 518 F.2d 955, 959 (2d Cir.
 7 1975). This arises from the fact that the respondent is faced with the possibility of imprisonment. *Ibid.*

8 The law is also clear that a respondent charged with civil contempt is entitled to court-
 9 appointed counsel only if he is indigent (**Ridgway**, 720 F.2d at 1415; **United States v. Anderson**, 553
 10 F.2d 1154, 1155-1156 (8th Cir. 1977)), and indigence is a determination to be made by the court under
 11 28 U.S.C. § 1915, "Proceedings in Forma Pauperis," which requires that the respondent produce an
 12 affidavit stating that he is unable to pay. Although the exact requirements of the affidavit vary from
 13 jurisdiction to jurisdiction (see, e.g., **Martin-Trigona v. Schiff**, 600 F. Supp. 1187, 1192 (D.D.C. 1984)
 14 (holding affidavit that was not notarized was not sufficient); **Atkins v. Sullivan**, 387 F.2d 140, 141
 15 (10th Cir. 1967), cert. denied, 391 U.S. 927, reh'g denied, sub. nom., **Kelly v. State of Kansas**, 392
 16 U.S. 947 (1968) (where affidavits were not notarized trial court properly denied plaintiff's motion to
 17 proceed in forma pauperis); **Jefferson v. United States**, 277 F.2d 723 (9th Cir. 1960) (requiring
 18 affidavit to give grounds of inability to pay with particularity)), this Circuit requires that the respondent
 19 state in the affidavit, with "some particularity, definiteness, and certainty," the facts as to his poverty.
 20 **Dreyer v. Jalet**, 349 F. Supp. 452 (S.D. Tex. 1972), aff'd, 479 F.2d 1044 (5th Cir. 1973).

21 II.

22 A FINDING OF CIVIL CONTEMPT IS APPROPRIATE

23 Civil contempt is appropriate as the respondent refuses to comply with the Order Enforcing
 24 Summons. In a civil contempt matter, the government meets its initial burden by showing only a
 25 failure to comply; "the proof of contempt must be clear and convincing." **United States v. Rylander**,
 26 656 F.2d 1313, 1318 (9th Cir. 1981) ("Rylander I"), rev'd on other grounds, 460 U.S. 752 (1983)
 27 (Rylander II"); **United States v. Powers**, 629 F.2d 619, 626 n. 6 (9th Cir. 1980). The burden then
 28 shifts to the defendant to come forward and show "categorically and in detail" why he is unable to

1 comply. **NLRB v. Trans Ocean Export Packing, Inc.**, 473 F. 2d 612, 616 (9th Cir. 1973); **Rylander**
 2 **I**, 656 F. 2d at 1318; **Rylander II**, 460 U.S. at 755.

3 This case arises out of a proceeding wherein the IRS summonses were ordered enforced. A
 4 respondent in a summons enforcement case may contest the summons "on any appropriate ground."
 5 **Resiman v. Caplin**, 375 U.S. 440, 449 (1964); **Rylander II**, 460 U.S. at 757. Because lack of
 6 possession or control of records is a ground upon which a summons may be contested, it may not be
 7 raised for the first time in a contempt proceeding. **Rylander II**, supra.

8 The attached Declaration of Thomas Moore establishes the requisite *prima facie* case of
 9 contempt, specifically, the failure of the Respondent to comply with this court's December 20, 2007,
 10 Order Enforcing Summonses. Through the Declaration of Thomas Moore, including respondent's
 11 reply letter dated January 8, 2008, the United States meets its burden to show, by clear and convincing
 12 evidence, that Paul J. Sholtz has failed comply with a court order. Declaration of Moore at ¶ 5. The
 13 Order Enforcing Summonses required respondent to attend, testify, and produce books, papers, or other
 14 data as required and called for by the terms of each of the summonses. The Declaration of Thomas
 15 Moore shows that the respondent did not produce the required records or fully testify as required by the
 16 order.

17 **CONCLUSION**

18 For the foregoing reasons, the United States of America and Revenue Officer Craig Harbridge
 19 respectfully request that this Court find Paul J. Sholtz in contempt for his disobedience of the Order
 20 Enforcing Summonses.

21 JOSEPH P. RUSSONIELLO
 22 United States Attorney

23 /s/ Thomas Moore
 24 THOMAS MOORE
 Assistant United States Attorney
 Chief, Tax Division

1 **CERTIFICATE OF SERVICE**

2 I, KATHY TAT declare:

3 That I am a citizen of the United States of America and employed in San Francisco County,
4 California; that my business address is Office of United States Attorney, 450 Golden Gate Avenue,
5 Box 36055, San Francisco, California 94102; that I am over the age of eighteen years, and am not a
6 party to the above-entitled action.

7 I am employed by the United States Attorney for the Northern District of California and discretion
8 to be competent to serve papers. The undersigned further certifies that I caused a copy of the
9 following:

10 **MOTION TO FIND RESPONDENT IN CONTEMPT AND MEMORANDUM IN SUPPORT
11 OF UNITED STATES OF AMERICA'S REQUEST; DECLARATION OF THOMAS MOORE
12 IN SUPPORT OF MOTION TO FIND RESPONDENT IN CONTEMPT; and [proposed]
13 ORDER FINDING RESPONDENT IN CONTEMPT**

14 to be served this date upon the party(ies) in this action by placing a true copy thereof in a sealed
15 envelope, and served as follows:

16 **FIRST CLASS MAIL** by placing such envelope(s) with postage thereon fully prepaid in the
17 designated area for outgoing U.S. mail in accordance with this office's practice.

18 **PERSONAL SERVICE (BY MESSENGER/HAND DELIVERED)**

19 **FACSIMILE (FAX)** No.: _____

20 to the parties addressed as follows:

21 Paul J. Sholtz
22 500 West Middlefield Road, #99
23 Mountain View, California 94043

24 I declare under penalty of perjury under the laws of the United States that the foregoing is true
25 and correct.

26 Executed on February 20, 2008 at San Francisco, California.

27 /s/ Kathy Tat

28 **KATHY TAT**
Legal Assistant